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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 309(j)  
of the Communications Act -  
Competitive Bidding

Amendment of the Commission's  
Cellular PCS Cross-Ownership Rule

Implementation of Sections 3(n) and 332  
of the Communications Act  
Regulatory Treatment of Mobile Services

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PP Docket No. 93-253 ✓

GN Docket No. 90-314

GN Docket No. 93-252

INFORMAL COMMENTS

The law firm of Santarelli, Smith & Carroccio ("SS&C"), for itself and on behalf of certain of its clients who anticipate participating in the Commission's auction of C Block Broadband PCS authorizations, hereby submits informal comments regarding the Commission's "Further Notice of Proposed Rulemaking" ("FNPRM") in the captioned proceedings.<sup>1/</sup> For its comments, SS&C states as follows:

General Comments

The Commission is to be commended for its prompt and creative response to the situation created by the Supreme Court's recent Adarand decision.<sup>2/</sup> The Commission has acted wisely and equitably in expanding the availability and scope of the bidding

<sup>1/</sup> FCC 95-263, released June 23, 1995, Erratum, released June 26, 1995.

<sup>2/</sup> Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (U.S. June 12, 1995).

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credit and installment payment benefits available to small businesses. By expanding those benefits, the Commission has done all it can to provide previously organized "designated entity" applicants the opportunity to continue with their established plans to participate in the C Block auction. Most potential applicants previously structured to obtain the full range of designated entity benefits will be able to retain those benefits with minimum disruption of their existing structures. For these reasons, SS&C agrees with, and supports, the proposals set forth in the FNPRM, except to the extent discussed below.

#### Necessary Clarification

The FNPRM proposes withdrawing race- or gender-based benefits only from the C Block auction process. As stated in the FNPRM, the Commission has not "concluded that race- or gender-based measures are inappropriate for future spectrum auctions".<sup>3/</sup> It is apparent that the Commission intends to make every effort to justify, under the strict scrutiny standard, the use of race- or gender-based benefits in future PCS auctions. In fact, the Commission does not even "concede that [its] C block auction rules themselves are unconstitutional in the wake of *Adarand*."<sup>4/</sup>

In light of the Commission's clear intent to provide future race- or gender-based benefits to spectrum auction participants, the Commission's order adopting the rule changes

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<sup>3/</sup> FNPRM, at Para. 1.

<sup>4/</sup> FNPRM, at Para. 11.

proposed by the FNPRM should make it clear that any such future benefits will not be dependent upon, or be affected by, any applicant's participation, or non-participation, in the C Block auction.<sup>5/</sup> So that all C Block applicants can be assured that they are playing by the same rules, the Commission should affirmatively state in its implementing order that nothing related to the C Block auction, including the licenses resulting from that auction, will have any impact on any applicant's status or benefits in any other spectrum auction or application process.

#### Affiliation Rules

The FNPRM proposes to continue the exception to the affiliation rules provided to Indian tribes and Alaska Regional or Village Corporations.<sup>6/</sup> However, membership in those entities is not open to everyone on a non-discriminatory basis, but is dependent upon a suspect classification, ethnic or racial background. The operation of the suspect classification membership

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<sup>5/</sup> It would be unfair and impermissible for the Commission to retroactively provide race- or gender-based preferences to certain C Block applicants. For example, it would not be appropriate for the Commission to provide designated entities race- or gender-based benefits for use only in those F Block markets where such designated entities had acquired C Block authorizations. Likewise, the Commission, after formally withdrawing race- or gender-based preferences for C Block applicants, should not be able to provide any future race or gender based relief (e.g., payment forgiveness) to C Block bidders or licensees. Absent full notice of the potential for such benefits prior to the C Block application cut-off date, any future provision of such relief would violate the APA's fundamental requirements for notice and opportunity in all agency actions.

<sup>6/</sup> FNPRM, at Para. 20.

prerequisites render the Commission's provision of benefits to these entities every bit as suspect as the race-based benefits called into question by *Adarand*. As the Commission utilized the "intermediate scrutiny" standard of review to determine the validity of the affiliation exception for Indian tribes and Alaska Regional or Village Corporations, that determination has been called into question by *Adarand*.<sup>7/</sup>

Because, under the Commission's present and proposed rules, Indian tribes and Alaska Regional or Village Corporations may use the affiliate exception to compete for all C Block markets, every other potential C Block applicant stands to be adversely affected by that exception.<sup>8/</sup> Throughout the FNPRM, the Commission

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<sup>7/</sup> SS&C respectfully submits that the Commission's reliance on the "Indian Commerce Clause" in this regard is not appropriate. The Commission's determination to provide benefits for Indian tribes and Alaska Regional or Village Corporations was based on the directive of the 1993 Omnibus Budget Reconciliation Act ("Budget Act") to assure the meaningful inclusion of "small businesses, rural telephone companies, and businesses owned by members of minority groups and women" in the competitive bidding process. In directing such inclusion, Congress did not invoke the Indian Commerce Clause. The inclusion of "American Indians" and "Alaskan Natives" in the Commission's ensuing C Block definition of "minority group" resulted from those classes inclusion in other definitions of that term previously imposed upon, and utilized by the Commission. (E.g., 47 U.S.C. Sec. 309(j)(1)(3)(C)(ii)). As *Adarand* requires strict scrutiny of race-based (i.e., minority group) criteria, the affiliate exception for Indian tribes and Alaska Regional or Village Corporations cannot be retained unless it is subjected to, and survives, strict scrutiny. It also should be noted that the Constitution specifically reserves the Indian Commerce Clause's powers to the Congress, therefore, those powers cannot be asserted by the Commission.

<sup>8/</sup> The affiliation exception may be less susceptible to challenge if it was applicable only to applications for markets in which are located the tribal lands of the particular Indian tribes and Alaska Regional or Village Corporations seeking the benefit of that exception.

stresses that one of its objectives is to avoid the delay that would result from legal challenges relying on *Adarand*.<sup>2/</sup> SS&C submits that the proposed retention of the affiliate exception for Indian tribes and Alaska Regional or Village Corporations invites such challenges. The affiliation exception also provides a basis on which a challenger could reasonably seek, and a court could reasonably grant, injunctive relief, including delay of the C Block application or auction process. As the Commission has otherwise gone to great lengths in the FNPRM to appeal-proof its rules for the C Block auction, SS&C respectfully submits that it would be less than prudent for the Commission now to retain the affiliation exception, and, thereby, expose the entire C Block licensing process to such further delay as may be attendant with a court challenge to the last vestige of race- or gender-based benefits regarding C Block.

#### Conclusion

The objective of these informal comments is to alert the Commission to certain pitfalls SS&C has discerned from its review of the FNPRM. This firm and its clients, like the Commission, have been frustrated by the repeated delays visited upon the C Block licensing process by court actions and decisions. The above comments point out those vulnerabilities SS&C believes would remain among the C Block rules if the proposals set forth in the FNPRM are adopted, without modification, by the Commission. SS&C now urges

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<sup>2/</sup> See, e.g., NPRM, at Paras. 8 and 20.

the Commission to consider carefully whether the retention of the last vestige of race- or gender-based benefits -- the affiliate exception for Indian tribes and Alaska Regional or Village Corporations -- is prudent in the wake of Adarand.

Respectfully submitted,

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